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Supreme Court, U.S.
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No. 87-

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

SHIRLEY A. NATION,

Petitioner,

v.

STATE OF GEORGIA,

and

EARL LEE, Sheriff,

Respondents.

****

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

****

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QUESTION PRESENTED

Does a state criminal defendant have a right to an individualized sentence protected by the due process clause of the Fifth and Fourteenth Amendments?

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, Shirley A. Nation respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on August 18, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. A copy of the opinion is attached as Appendix "A", infra. The opinion of the district court was unreported and appears as Appendix "B", infra.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1987. A timely petition for rehearing and en banc consideration was denied on August 18, 1987. The jurisdiction of this Court is invoked under the authority of Title 28, United States Code, Section 1254(1).

STATUTES INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall...be deprived of life, liberty, or property, without due process of law...

Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

Petitioner was charged by way of accusation in Douglas County Superior Court with the misdemeanor offense of theft by shoplifting six dollars worth of merchandise. On October 27, 1983, following a jury trial, Petitioner was

convicted. A sentencing hearing was conducted on November 23, 1983, the Honorable Robert J. Noland presiding. Petitioner was sentenced to a thirty day term of incarceration.

A direct appeal of the verdict and sentence was timely presented to the Court of Appeals of Georgia. Petitioner's conviction was affirmed by the Court of Appeals of Georgia. An application for writ of certiorari was not filed in the Georgia Supreme Court or the United States Supreme Court.

On December 18, 1984, Petitioner filed an application for a state writ of habeas corpus and a motion to remain free on bond during the pendency of that proceeding. The application raised the

narrow issue of whether or not a mandatory sentencing policy followed by the trial court in cases of misdemeanor shoplifting violates the due process protections embodied in the Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Georgia.

The trial court denied Petitioner's application for bail on Wednesday, December 19, 1984 and ordered that Petitioner be immediately taken into custody although the prior pronouncement of the trial court was for Petitioner to serve her sentence on weekends. An application for emergency supersedeas bond was filed in the Supreme Court of Georgia on Friday, December 21, 1984.

That same day, the Georgia Supreme Court directed that Petitioner be allowed to remain enlarged on bail pending the state habeas proceedings and direct appeal if necessary.

On January 10th and 11th, 1985, an evidentiary hearing on the state habeas petition was conducted before Judge Noland. During that hearing, counsel for the respective parties stipulated that during the presentment of the habeas application in the chambers of Judge Noland, the judge commented that all misdemeanor shoplifters who have appeared before him have been sentenced to incarceration.

Judge Noland orally denied the habeas petition on January 11, 1985, and

in spite of the supersedeas order of the Supreme Court, attempted to remand Petitioner into custody at that time.

Inter alia, Petitioner presented a narrow issue to the Georgia Supreme Court: whether the trial court's mandatory sentencing policy based upon the type of offense violated the due process and equal protection clauses of the Constitution of the State of Georgia and the Constitution of the United States?

The Supreme Court of Georgia affirmed the habeas court's ruling on September 5, 1985. Justice Smith, writing for the court in a 7 to 0 ruling, held that Petitioner did not establish the fact that the trial court "has

pursued a policy of sentencing every person convicted of shoplifting to a period of incarceration". A motion for reconsideration was timely filed. Petitioner requested the court to reconsider an "overlooked fact":

> At oral argument in this case, Justice Weltner noted that the transcript of proceedings clearly reflected that the trial court has a policy of mandatory sentencing as was evidenced by statements of the trial court during the habeas hearing.

The motion for reconsideration was denied on September 25, 1985. Justice Charles Weltner dissented.

On December 18, 1985, Petitioner filed a petition for writ of habeas corpus and motion to vacate sentence

[Title 28, United States Code, Sections 2241 and 2254]. The petition presented the narrow issue of whether a mandatory sentencing policy employed by the state trial court in misdemeanor shoplifting cases violated Petitioner's due process protections guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Following the filing of a response by Respondents and a traverse by Petitioner, the magistrate ordered that the record be expanded with documents supporting Petitioner's claim regarding the existence of a mechanical sentencing policy. A supplemental record was filed. That supplementation consisted of photocopies of every misdemeanor theft by shoplifting sentence

imposed by the state trial court for the past five years. A second supplementation, consisting of a statistical chart of sentences imposed by each sitting judge for each of the past five years was submitted by Petitioner.

Upon review of the submitted materials, the magistrate recommended that the habeas petition be granted. Inter alia, the magistrate concluded that the evidence established the existence of a mandatory sentencing policy of sentencing misdemeanor shoplifters to a period of incarceration of at least thirty (30) days. The magistrate further found that the state trial judge does not exercise discretion during the sentencing process. Respondents did not file

objections to the magistrate's report and recommendation.

On October 8, 1986, the district court ordered that the report and recommendation be declined. Although accepting the finding that the state trial court exercises a mechanical, mandatory sentencing policy, the district court mandated that Petitioner, a state prisoner, was deprived of no federal constitutional rights by the mechanical sentence imposed.

Following oral argument, the opinion of the district court was affirmed by the Eleventh Circuit in a per curiam opinion.

REASON FOR GRANTING THIS PETITION

This Court should review the lower court's decision in this case

because it involves a question of substantial importance in the administration of justice as it relates to the imposition of state criminal sentences.

THE HISTORICAL PERSPECTIVE

The guarantee of due process embodied in the Fifth Amendment to the United States Constitution and applicable to the States through the Fourteenth Amendment declares that no person shall "be deprived of life, liberty or property without due process of law".

Traditionally, this requirement of due process has been judicially viewed as a product of history. Rochin v. California, 342 U.S. 165 (1951), Jackman v. Rosebaum Company, 260 U.S. 22 (1922).

Conceptually, due process has been held to be "so rooted in the tradition and conscience of people as to be ranked as fundamental" [Snyder v. Massachusetts, 291 U.S. 97, 105 (1933)]; or as to be "implicit in the concept of ordered liberty". Palko v. Connecticut, 302 U.S. 319, 325 (1937).

In In re Gault, 387 U.S. 1 (1967), the United States Supreme Court re-acknowledged the sanctity of due process when it stated:

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the indispensable foundation of

> individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and limits the powers of which the state may exercise. As Mr. Justice Frankfurter has said: 'The history of American freedom is in no small measure, the history of procedural rules which have been fashioned from the generality of due process are our best evaluation of certain facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. Procedure is to law what scientific method is to science.' At 19-21.

This fundamental right applies equally to all individuals accused of criminal offenses. Adherence to requirements of due process is essential "[n]o matter how heinous the crime in

question and no matter how guilty an accused may ultimately be found after guilt has been established in accordance with the procedure demanded by the Constitution." Chessman v. Teets, 354 U.S. 156, 165 (1957).

Discussing the procedures of a criminal trial, the Supreme Court in Lisenba v. California, 314 U.S. 219, 236 (1941), declared that the "denial of due process is the failure to observe fundamental fairness essential to the very concept of justice".

INDIVIDUALIZATION OF SENTENCING

In Townsend v. Burke, 334 U.S. 736 (1948), a sentence was reversed due to misinformation submitted to the court by the prosecution. Inaccuracies outlined

in a pre-sentence report had been used by the trial court in formulation of a Petitioner's sentence. As justification for its reversal of the trial court's pronouncement, the Townsend court held:

> Consequently on this record we conclude that...this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or designed, is inconsistent with due process of law, and such a conviction cannot stand. It is not the duration or severity of this sentence that renders it unconstitutionally invalid; it is the carelessness or designed pronouncement of sentence so extensively and materially false...that renders the proceedings lacking in due process.
>
> Id. at 740-1.

Reliability was again more recently

addressed in United States v. Tucker, 404 U.S. 443 (1972), where a sentence was based upon two constitutionally invalid prior convictions. Remanding the case for consideration of the sentence, the court declared:

> [W]e deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of a constitutional magnitude. As in Townsend v. Burke, 334 U.S. 736, "this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." Id. at 741. The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him. Yet it is now clear that two of those convictions were wholly unconstitutional under Gideon

v. Wainwright, 372 U.S. 335.

Id. at 447.

Circuit courts have also abided by the principles emanating from the Townsend and Tucker opinions. Scrutinizing sentencing procedures, various courts have proclaimed that "...misinformation or a misunderstanding that is materially untrue, regarding a prior criminal record, or material false assumptions as to any facts relevant to the sentencing process are a violation of due process." See, Collins v. Buchtoe, 495 F.2d 343, 345 (6th Cir. 1974); United States v. Espinoza, 481 F.2d 626 (9th Cir. 1971); United States v. Malcom, 432 F.2d 809, 819 (2nd Cir. 1970).

DUE PROCESS AND SENTENCING

The constitutional requirement of due process does not terminate when a Petitioner is deemed guilty, but continues to operate during the sentencing process. Gardner v. Florida, 430 U.S. 349 (1977). A sentencing court may not constitutionally rely on mistaken information or baseless assumptions. Roberts v. United States, 445 U.S. 552 (1980); United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1947). Furthermore, a sentencing court must be concerned not merely when it has relied on demonstrably false information, but also "when the sentencing process created a significant "possibility that misinformation infected

the decision." United States v. Bass, 535 F.2nd 110, 118 (D.C. Cir 1976). See also, United States v. Lemon, 723 F. 2nd 922 (D.C. Cir 1983).

MANDATORY SENTENCING AND DUE PROCESS

Appellate review of a sentence imposed within statutory limitations is generally prohibited. This policy is founded upon the premise that a trial judge has the best opportunity to observe and evaluate the character of a criminal Petitioner. Woosley v. United States, 478 F.2d 134 (8th Cir. 1973). However, a trial judge's mechanical approach to the sentencing process "plainly conflicts" with the sentencing guidelines announced by the United States Supreme Court.

Mr. Justice Hugo Black, speaking for

the Supreme Court in Williams v. New York, 337 U.S. 241, 247 (1949) stated:

> A sentencing judge * * * is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. * * *
>
> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. * * * The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.

Later, in Williams v. Oklahoma, U.S. 576,585 (1959), the Court reaffirmed these principles saying:

> Necessarily, the exercise of a sound discretion in [sentencing] required

> consideration of all the circumstances of the crime, for "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment. . . ." Williams v. New York, supra, [337 U.S.] at 247 [69 S.Ct. at 1083, 93 L.Ed. 1337]. In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.

In Williams v. New York, supra, the United States Supreme Court cited with approval certain basic considerations to be used in determining an appropriate sentence: (a) the reformation of the offender, (b) the protection of society, (c) the disciplining of the wrongdoer, and (d) the deterrence of others from committing like offenses. 337 U.S. at

248, n. 13.

> The court's duty to individualize the sentence simply means that, whatever the judge's thoughts as to the deterrent value of a jail sentence, he must in every case re-examine and measure that view against the relevant facts and other important goals such as the offender's rehabilitation. Having done so, the district judge must finally decide what factors, or mix of factors, carry the day. United States v. Foss, 501 F.2d 522, 528 (1st Cir. 1974).

A trial judge possesses wide discretion in the imposition of sentence, but is not free to ignore the sentencing guidelines established by the United States Supreme Court. Woosley, supra, at 144. See also, Dorsynski v. United States, 418 U.S. 424, 443 (1974). Accord, United States v. Daniels, 446

F.2d 967 (6th Cir. 1971).

In the instant matter, the evidence established that the trial court abdicated his duties to the detriment of Petitioner's constitutional rights. Her sentence should be vacated and her case remanded for further proceedings.

CONCLUSION

Based upon the foregoing arguments, cases, and authorities, Petitioner respectfully prays that this Court issue a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

Frank J. Petrella

APPENDICES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8805

SHIRLEY ANN NATION,

Petitioner-Appellant,

versus

STATE OF GEORGIA and
EARL LEE, SHERIFF,

Respondents-Appellees.

Appeal from the United States
District Court for the
Northern District of Georgia

(June 12, 1987)

Before RONEY, Chief Judge, FAY, Circuit Judge, and ATKINS*, Senior District Judge.

PER CURIAM:

The record in this matter establishes that there was in fact no policy of mandatory sentencing and thus all other issues fall. Any finding to the contrary would be clearly erroneous.

AFFIRMED.

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*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SHIRLEY ANN NATION,	)	
	)	
Plaintiff,	)	
	)	Civil Action
vs.	)	No. C 85-4669 A
	)	
STATE OF GEORGIA and	)	
EARL LEE, Sheriff,	)	
	)	
Defendants.	)	

O R D E R

The petitioner has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, seeking relief from a sentence imposed upon her by the Superior Court of Douglas County, Georgia. Although the magistrate has recommended that the petition be granted, this court, for the reasons given below, declines to adopt the recommendation of

the magistrate.

Upon a jury's finding that the petitioner was guilty of the charge of theft by shoplifting, the trial court sentenced the petitioner to a term of 12 months, to serve 30 days in confinement, with the rest of the sentence to be served on probation. The verdict and sentence were affirmed on appeal. Nation v. State, 172 Ga. App. 354 (1984). She then filed a petition for a writ of habeas corpus in the Superior Court of Douglas County, raising the issue of whether a mandatory sentencing policy violated due process. The petition was denied, and a certificate of probable cause was granted by the Supreme Court. The Supreme Court then remanded the case

for the habeas court (which was also the sentencing court) to enter findings of fact and conclusions of law upon which the denial of the petition for writ of habeas corpus was based. Following the entry of such findings and conclusions, the Supreme Court affirmed the denial of the writ, holding that the petitioner had not established the fact that the trial court had pursued a policy of sentencing every person convicted of shoplifting to a period of incarceration. Nation v. Lee, 254 Ga. 726 (1985). The petitioner then filed the instant petition in this court.

Although the evidence is contradictory, this court will assume for purposes of this petition that Judge

Robert J. Noland, the state trial judge who sentenced the petitioner, does have a policy of sentencing all persons found guilty of shoplifting to a period of incarceration. Consequently, the sole issue before this court is whether such a sentencing policy, without regard to individual circumstances, is a violation of due process.

The Eleventh Circuit, together with several other circuits, has held that a mechanical sentencing formula is an abdication of judicial responsibility and that implementing a rigid sentencing policy based soley on the crime of which a defendant is convicted is an abuse of discretion. United States v. Brown, 723 F.2d 826 (11th Cir. 1984). See also

United States v. Barker, 771 F.2d 1362 (9th Cir. 1985); United States v. Sparrow, 673 F.2d 862 (5th Cir. 1982); United States v. Foss, 501 F.2d 522 (1st Cir. 1974); United States v. Hartford, 489 F.2d 652 (5th Cir. 1974); United States v. Baker, 487 F.2d 360 (2d Cir. 1973); United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970). However, each of these cases involved a situation wherein a federal appellate court was reviewing a sentence imposed by a federal district court. In each of these case the federal appellate court held that the sentencing court had abused its discretion in imposing sentence; however, none of the appellate courts held that the refusal to exercise discretion violated the

defendant's constitutional rights.

The petitioner has cited no case wherein a federal appellate court has held that implementing a policy of imposing a particular sentence or a particular crime violates a defendant's constitutional rights. The two Supreme Court cases relied upon by the petitioner involving federal review of a state sentence do not stand for the proposition that a mandatory sentencing policy is unconstitutional. In Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079 (1949), and Williams v. Oklahoma, 358 U.S. 576, 79 S. Ct. 421 (1959), the Supreme Court merely held that a sentencing judge is authorized to consider all the mitigating and

aggravating circumstances involved in the crime and is not bound strictly by the evidence presented during the trial of the case. Consequently, the Supreme Court held that a trial court is authorized to rely upon information presented by probation workers or presentence investigators. Although the Supreme Court and federal appellate courts have encouraged individualized sentencing, neither the Supreme Court nor the Eleventh Circuit has held that the failure to conduct individualized sentencing is unconstitutional.[1]

Although the sentencing court may have abused its discretion in following a policy that does not result in individualized sentencing, this court

holds that such an abuse of discretion is not unconstitutional. Consequently, the petitioner's petition for writ of habeas corpus is DENIED.

SO ORDERED, this 7th day of October, 1986.

/s/

ROBERT L. VINING, JR.
United States District Judge

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1 Of course, the Supreme Court has held that such individualized sentencing is constitutionally required in death cases. However, the Supreme Court has also recognized that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-99, 103 S. Ct. 3446, 3451 (1983).